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Third report on international liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary damage from hazardous activities)

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I. Introduction

1. It may be recalled that the International Law Commission finalized a set of 17 draft articles on the sub-topic of prevention on its first reading in 1998. These were transmitted to the General Assembly in a report covering the work of the Commission on its fiftieth session.[1] In transmitting the draft set of 17 articles on the sub-topic of prevention, the Commission also requested comments from Member States of the United Nations on the following three questions:

(1) Should the duty of prevention still be treated as an obligation of conduct? Or should failure to comply be subjected to suitable consequences under the law of State responsibility or civil liability or both where the State of origin and the operators are both involved? If the answer to the latter question is in the affirmative, what types of consequences are appropriate or applicable?

(2) What form should the draft articles take: a convention, a framework convention or a model law?

(3) What kind or form of dispute settlement procedure is most suitable for disputes arising from the application and interpretation of the draft articles?

2. Several States participated in the discussion of the item on international liability and commented on the draft articles. Observations made by States on the three questions raised by the Commission were the subject of the Second Report of the Special Rapporteur.[2] Thereafter, States were invited to submit written comments on the set of draft articles by the end of 1999 to enable the Commission to take up the second reading of the draft articles on prevention. Five States have submitted their written comments.[3] Given the availability of views of States as expressed both in the debates of the Sixth Committee of the General Assembly in 1998 and in 1999, as well as in written comments, it is opportune to review various articles on prevention prepared in the first reading of the Commission. It may be helpful to summarize the comments from States before considering possible changes suggested by them.

II. Comments of Member States

3. Once a decision was taken by the Commission to deal with the topic of prevention first, separating it from the topic of liability, the finalization of the draft articles within the year was appreciated by States.[4] Several States, while appreciating the general thrust of the draft articles on prevention, felt strongly that the Commission should not overlook the main objective of its mandate, i.e.,

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[1] See *Official Records of the General Assembly, Fifty-third Session, Supplement No. 10* (A/53/10), chap. IV. As explained by the Chairman of the Commission, Mr. Baena Soares, these draft articles drew their inspiration from the articles adopted by the Working Group of the Commission in 1996, which had been reconsidered in the light of the Commission's decision to focus first on the prevention aspects of the topic, as well as recent developments, especially the adoption of the 1997 Convention on the Law of the Non-Navigational Uses of International Watercourses (A/C.6/53/SR.13, para. 11).

[2] A/CN.4/501.

[3] As of 12 April 2000, France, Lebanon, the Netherlands, Turkey and the United Kingdom of Great Britain and Northern Ireland had submitted their comments; see A/CN.4/509.

[4] See A/C.6/53/SR.13-22.

international liability for injurious consequences arising out of acts not prohibited by international law.[5] In their view, the Commission has a duty to deal with liability as it was an important main component of the equation, together with prevention. At least one State cautioned the Commission against taking up the subject of liability too soon before the existing trends were settled.[6]

4. On the scope of the topic, some States regretted the decision of the Commission to exclude activities which actually caused harm. It may be recalled that draft article 1 (b) was considered in 1996 by the Working Group of the Commission, which placed it in brackets. It was suggested that the regime should deal with "present" harm as well as "future" harm.[7] One State doubted whether the draft articles would apply to activities which, if taken individually, would only cause less than significant harm, but taken together could produce significant harm.[8] It was suggested that the draft articles should deal with harm caused to the global commons.[9]

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[5] For example, Bangladesh (draft articles were "constructive and practical", SR.16, para. 2), and Mexico (they constituted a "full and balanced document", SR.16, para. 6) wanted the Commission to deal with liability. Similarly, see statements/comments of Ireland (SR.20, para. 49), Viet Nam (SR.20, para. 38), Hungary (SR.19, para. 15), New Zealand (SR.16, para. 44), Austria (SR.15, para. 7), Sri Lanka (SR.22, para. 24), the Nordic countries (SR.17, para. 3), Egypt (SR.22, para. 18), Portugal (SR.20, para. 28), Guatemala (SR.13, para. 58), the United Republic of Tanzania (SR.13, para. 59), Bahrain (SR.21, para. 12), Romania (SR.18, para. 1), the Libyan Arab Jamahiriya (SR.18, para. 42), Cuba (SR.18, para. 50), Tunisia (SR.18, para. 60), Nigeria (SR.17, para. 33), Uruguay (SR.16, para. 73), Mongolia (SR.15, para. 40), Argentina (SR.15, para. 94), Slovakia (SR.22, para. 28) and Lebanon (A/CN.4/509, p. 5).

[6] For instance, the United States of America noted that, following the completion of the second reading ... a pause in the Commission's work might be appropriate in order for international practice to develop that area. His delegation believed that international regulation in the area of liability should proceed through careful negotiation on particular topics, such as oil pollution or hazardous wastes, or in particular regions, and not by attempting to develop a single global regime. Once State practice had developed further, the Commission might be asked to resume its work in the light of precedents established (A/C.6/54/SR.19, para. 38).

[7] Guatemala (SR.13, para. 56). On behalf of the Nordic countries it was stressed that not only was the notion of prevention relevant to activities involving risk but that it also came into play in relation to the containing and minimizing of the adverse effects arising from the normal conduct of hazardous activities and from accidents (A/C.6/54/SR.25, para. 124; also A/C.6/53/SR.17, para. 2). Second, the related assumption in paragraph (13) of the commentary to draft article 1 was that the proper distinction was rather between events that were certain and those that were less than certain and possibly quite improbable (A/C.6/53/SR.15, para. 5).

[8] See the comment by the United Kingdom which assumed that the articles were not intended to apply to groups of activities each of which would have minimal transboundary impact which, when taken together, would cause transboundary harm. It suggested that it would be useful to clarify that the draft articles applied to "any activity" (in the singular) "not prohibited by international law which involves a risk of causing significant transboundary harm" (A/CN.4/509, p. 8).

[9] While endorsing the draft articles as "logical, complete and moderate", Italy recommended that they should cover harm to the "global commons"; in supporting the decision "to distinguish between harmful activities and those which were merely hazardous in the sense that they entailed a risk of significant transboundary harm" it noted that it understood, but did not agree with, the reasons for the decision to limit the obligation of prevention to harm caused in the territory of and in other places under the jurisdiction or control of another State. It pointed out that in that connection the International Court of Justice, in its advisory opinion on the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, had referred to "prevention specifically in relation to regions over which no State had sovereignty" (A/C.6/53/SR.15, paras.

5. Some States felt that the draft articles should have covered harm in the ecosystem by including a suitable reference to it in article 1 following the example of articles 20 and 22 of the 1997 Convention on the Law of the Non-Navigational Uses of International Watercourses.[10] However, most States endorsed the scope of the draft articles in their current form.[11] Even though no State questioned the use of the phrase "acts not prohibited by international law" employed in draft article 1, this has been the subject of considerable discussion among international law experts. This essentially raises the question of the relationship between the topic of State responsibility and international liability. This discussion is also one of right focus on the implications of an activity as opposed to the legality or validity of the activity itself. It is suggested that very few activities are prohibited by international law and that it is fundamentally misconceived to generally categorize activities as permitted or not prohibited by international law.[12]

6. It was suggested that draft article 2 (a) indicating a range or spectrum encompassing the "risk" covered by the draft articles was confusing and could be redrafted.[13] With respect to draft article 2 (c), it was observed that the "causal" or "spatial" connection between harm originating from the State of origin and occurring in the affected State should be explicitly brought out.[14]

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64 and 65). For the Netherlands' view to the same effect, see A/CN.4/509, p. 5. For a contrary view, see the remarks of China, A/C.6/53/SR.14, p. 6, para. 40.

[10] See the comment of Switzerland (A/C.6/53/SR.13, para. 64); see also Chile, which noted that the Commission should explore the feasibility of an entity or institution being empowered to act on behalf of the international community in the event of damage to common spaces, perhaps through the establishment of a high commissioner on the environment, as had been suggested. Chile felt that the observer from Switzerland had raised an interesting notion in that connection by referring at a previous meeting to the concept of "damage to ecosystems" (A/C.6/53/SR.14, para. 22). Austria appeared to raise the same concern, but referred more directly to the so-called creeping pollution affecting the environment. It stated that: the suggestion was that a State's obligation to prevent significant transboundary harm "that was **bound** to occur might be discharged by the States taking measures to prevent or minimize the risk of such harm". The assumption that State conduct involving the risk of **inevitable** significant transboundary harm did not, as such, entail that State's obligation to cease and desist from the risk-bearing conduct was highly questionable and reflected an anachronistic view of the fundamental balance of States' rights and obligations in situations in which a significant degradation of the environment was involved (emphasis added) (A/C.6/53/SR.15, para. 5).

[11] For example, France noted: that the draft could be regarded as restrictive, for two reasons: that was a welcome restriction, in comparison with the 1996 draft (A/CN.4/509, p. 4). See also the United States, which welcomed the "Commission's initiative in redirecting its work to focus on avoiding transboundary harm" (A/C.6/53/SR.14, para. 44). It also expressed its happiness at the completion of the first reading of the draft articles "notwithstanding the difficulty of the task and the time that had been required". In this view, the Commission had done a comprehensive and thorough review of the issue of prevention and the obligation of due diligence (A/C.6/54/SR.19, para. 37).

[12] See Ian Brownlie, *System of the Law of Nations: State Responsibility*, Part I (1983).

[13] Guatemala (A/C.6/53/SR.13, para. 56).

[14] The United Kingdom suggested: that transboundary harm means harm which is caused by an activity in the territory of the State of origin or in other places under its jurisdiction or control and which occurs in the territory of or in other places under the jurisdiction or control of another State, whether or not the States concerned share a common border (A/CN.4/509, p. 9). See also Venezuela (A/C.6/53/SR.15, para. 27).

7. Some States felt that the type of the activities which came within the scope of the draft articles should be specified to avoid unnecessary confusion.[15] Others found such a task was avoidable as it could not be complete and final in view of evolving scientific and technological developments.[16] It was also suggested that in the absence of a binding provision on settlement of disputes the Commission should clarify further the concept of "significant harm" or drop the adjective "significant" altogether.[17] A contrary view was expressed that the threshold of "significant harm" was low and that the same should be given greater emphasis as "serious" or "substantial" harm. In that connection it was also noted that the principle of "no harm" should not be given undue importance.[18] On the other hand, several States supported the threshold of "significant harm".[19] One State indicated further that the obligation of conduct was based not on the absolute concept of minimizing risk, the limits of which would be difficult to grasp, but on the crucial requirement of an equitable balance of interests among the States concerned. It was also added that to this end it was necessary to incorporate the idea of equitable balance of interests in article 3 following the example of article 5 of the Convention on the Non-Navigational Uses of International Watercourses, 1997.[20]

8. Some States indicated that the duty of prevention was subject to the basic right of a State to develop its natural resources in accordance with the principle of sovereignty in the interest of the economic well-being of its people.[21] It was noted that State sovereignty should be stressed, together with the right to development and capacity-building, to enable States to better discharge applicable duties of due diligence or standards of due care.[22] One State questioned the lack of emphasis on sustainable development within the draft articles and regretted the lack of any

[15] India (A/C.6/53/SR.15, para. 91); Malawi (A/C.6/53/SR.16, para. 71); Israel (para. 19); United Kingdom (A/CN.4/509, p. 8); and Netherlands (ibid., p. 9).

[16] Japan (A/C.6/53/SR.14, para. 19); Venezuela (A/C.6/53/SR.15, para. 26); Uruguay (A/C.6/53/SR.16, para. 90); Tunisia (A/C.6/53/SR.18, para. 60); Chile (A/C.6/53/SR.14, para. 21); and Indonesia (A/C.6/53/SR.15, para. 36).

[17] Pakistan (A/C.6/53/SR.17, para. 21); also Viet Nam (A/C.6/53/SR.20, para. 40).

[18] Ethiopia (A/C.6/53/SR.15, para. 42).

[19] For example, the Czech Republic noted that the term "significant" had given rise to much debate in the past, including during the negotiations concerning the 1997 Convention on the Law of the Non-Navigational Uses of International Watercourses, to the point where the controversy now appeared to have exhausted its potential. Under those circumstances, the choice of the term "significant" appeared to be justified (A/C.6/53/SR.15, para. 56). Mexico observed that, with regard to the threshold of harm, although any wording involved a value judgement, the inclusion of activities involving the risk of causing "significant harm" provided some elements of certainty; "significant" was the most appropriate term (A/C.6/53/SR.16, para. 11). See also Greece (A/C.6/53/SR.22, para. 43) and China (A/C.6/53/SR.14, para. 40). Several others generally supported the draft articles: Germany (A/C.6/53/SR.15, para. 76); Italy (A/C.6/53/SR.15, para. 64); Mongolia (A/C.6/53/SR.15, para. 39); Indonesia (A/C.6/53/SR.15, para. 36); and Malaysia (A/C.6/53/SR.15, para. 32).

[20] Czech Republic (A/C.6/53/SR.15, para. 57).

[21] Malaysia (A/C.6.53/SR.15, para. 32) and Indonesia (A/C.6/53/SR.15, para. 36).

[22] China, while endorsing the general thrust of the draft articles on prevention which were essential to protect the environment and applied only to activities which involved the risk of causing significant transboundary harm, noted "the absence of provisions embodying the need to pay due attention to special conditions of the developing world" as a "drawback". It stressed that for the benefit of the developing countries and for the common good, it was necessary to promote technology transfers on equitable terms, develop a common fund for financial support and provide training and technical cooperation (A/C.6/53/SR.14, para. 42).

provision for financial and other assistance and recognition of common but differentiated responsibilities to achieve the goal of environmental protection.[23] Other States also noted the need to make provisions in the draft articles to reflect the interests of developing countries.[24]

9. While noting that the duty of prevention in article 3 was a duty of due diligence, some States suggested that the same might be directly incorporated in that article instead of referring to the duty of the State of origin to take "all appropriate measures".[25]

10. However, a view was expressed that the duty of prevention under article 3 was essentially reduced to being a "negotiable duty" between the State of origin and the States likely to be affected, given the duty of cooperation in general, consultation (article 11) and the equitable balance of interests to be achieved (article 12).[26] However, that view is not generally shared. On the other hand, it was noted that the duty of due diligence as articulated by the Commission was in accordance with current realities of State practice and international law.[27] Further, several States

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[23] India, observing that reference to equitable balance of interests in article 12 and the linkage of capacity-building to achieving the goals of prevention, as noted in paragraph 16 of the commentary to article 3, was not sufficient and regretted that the draft articles failed to embody important principles such as the sovereign right of States to exploit their own natural resources according to their own policies, the concept of common but differentiated responsibility and the international consensus on the right to development; in that regard, India felt it was unfortunate that none of the draft articles had been devoted specifically to the need for an overall balance between the environment and development, as established at the United Nations Conference on Environment and Development (A/C.6/53/SR.15, para. 87).

[24] Hungary (A/C.6/53/SR.19, para. 17); Cuba (A/C.6/53/SR.18, para. 51); Tunisia (A/C.6/53/SR.18, para. 60); Malawi (A/C.6/53/SR.16, para. 72); Egypt (A/C.6/53/SR.22, para. 18) (Egypt felt that the sub-topic had to be treated with great caution, for it involved technical, as well as legal issues and standards which varied from State to State); Republic of Korea (A/C.6/53/SR.16, para. 22) (The Republic of Korea felt it was essential to strike a balance between the interests of the State of origin and those of the State or States likely to be affected, developmental and environmental considerations, and between advanced and developing countries).

[25] Switzerland (A/C.6/53/SR.13, para. 65); Netherlands (A/CN.4/509, p. 9).

[26] In a written attachment to a statement in the Sixth Committee of the General Assembly (A/C.6/53/SR.15, para. 18), Austria stated that the problematic nature of the Commission's view of the present-day allocation of international rights and obligations between risk-creating and risk-exposed States was once again driven home in draft articles 11 and 12. In essence, article 11, paragraph 1, subjected measures aimed at the minimization of a risk of (significant) transboundary harm to a consultation procedure and, ultimately, negotiations between the States concerned. In the final analysis, it rendered negotiable also the fundamental legal obligation to prevent significant transboundary harm. The United Kingdom appeared to share the concern of Austria, but only up to a point and not fully. For it noted that it supported the formulation of the general duty of prevention in article 3 and considered it to reflect existing international law. However, while it saw the value in the development of a duty of consultation and the concept of equitable balancing of interests, it was concerned that, as currently drafted, articles 11 and 12 might have the effect of undermining the general duty of prevention. At any rate, the relationship between these articles should be clarified (A/CN.4/509, p. 7). In fact, the United Kingdom suggested, in connection with article 12, that a proper clarification would be what was indicated as the correct purpose of article 11 on consultations. It noted that, as regards the substance of the consultations, it assumed that the purpose was not to detract from the State of origin's duty of prevention in article 3, but rather to discuss a mutually acceptable choice of measures to give effect to that duty (ibid., p. 12).

[27] For example, the Russian Federation noted that the obligation of prevention naturally entailed

specifically endorsed the duties of cooperation, consultation and the need to achieve equitable balance of interests with a view to achieving a proper balance of interests of all States concerned.[28]

11. While one State rejected articles 7 to 16 as not in conformity with current requirements of law, in particular the idea of "prior consent" incorporated therein,[29] another State expressed reservations regarding the requirements that the public must be informed of potential risks (draft article 9) and the principle of non-discrimination (draft article 16).[30] It was noted that unless the States concerned had compatible legal systems, the implementation of those provisions could raise numerous questions of jurisdiction and effective implementation. According to this view, article 16 could serve as a guideline for progressive legislative development. The same State also opposed compulsory third-party dispute settlement and preferred negotiation between States as more appropriate. It was also suggested that it was not appropriate for such a procedure to be incorporated, as a provision, in a framework convention.

12. Several other suggestions were also made to improve the effectiveness of the regime of prevention. One suggestion was to include in the set of draft articles a provision concerning emergency preparedness and the duty of notification in the case of such emergencies arising out of activities falling within the scope of the draft articles.[31] Another suggestion was to make cooperation between States and competent international organizations more central for the implementation of the duty of prevention.[32] Some States suggested the imposition of more specific time limits on States under articles 10, 11 and 13.[33] It was also suggested that former draft article 3 adopted by the Working Group of the Commission in 1996 on the freedom of a State to act within its own territory, which had been omitted from the

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due diligence, but that such due diligence could not be identical for all countries: standards that were normal for developed countries might be unattainable for countries in economic difficulties. The delegation therefore endorsed the use in compliance procedures of the approach and incentives to comply, with the use of sanctions as a last resort. It considered that the draft articles followed a correct approach and were in keeping with contemporary international law (A/C.6/54/SR.28, para. 72).

[28] Greece (A/C.6/53/SR.22, para. 43); United Republic of Tanzania (A/C.6/53/SR.13, para. 61 (commending article 12, especially 12 (a)). Switzerland noted that the system proposed in draft articles 7 and 8 and 10 to 13, embodying a relatively broad duty of notification counterbalanced by the fact that the obligation to prevent was not absolute but conditioned by the equitable balance of interests referred to in draft article 12, seemed admirable (A/C.6/53/SR.13, para. 66). See also the Czech Republic (A/C.6/53/SR.15, para. 57), Italy (A/C.6/53/SR.15, para. 66) (article 12 was supported for the balance set between the interests of the State of origin and those States likely to be affected), Germany (A/C.6/53/SR.15, para. 78) (articles 11 and 12 were supported to maintain a balance between the interests of the States concerned). Slovakia (A/C.6/53/SR.22, para. 28) (at first glance, the draft articles on prevention seemed to be well conceived, since they were aimed at emphasizing the duty of prevention and striking a fair balance between the interests of the States concerned).

[29] For Turkey's view, see A/CN.4/509, p. 5.

[30] For India's view, see A/C.6/53/SR.15, paras. 88-89.

[31] Comments of the Netherlands (A/CN.4/509, pp. 5 and 14). See also Bulgaria (A/C.6/53/SR.16, para. 24).

[32] The Netherlands, A/CN.4/509, p. 9.

[33] Switzerland (A/C.6/53/SR.13, para. 66); Mexico (A/C.6/53/SR.16, para. 14); Greece (A/C.6/53/SR.22, para. 43). For a different view, see Germany (A/C.6/53/SR.15, para. 77) ("timely notification").

present draft articles, should be reincorporated at least in a preambular paragraph.[34] A number of other suggestions were essentially of a drafting nature and could be examined by the Drafting Committee.[35]

13. The comments noted above raised issues concerning the scope of the topic, the need for specifying activities covered by the topic, the desirability of clarifying further the concept of "significant harm", the relationship between the duty of prevention and liability, liability and responsibility, the impact of the test of equitable interests on the duty of due diligence and the usefulness of specifying fixed time limits for exchange of information between the States concerned under articles 10, 11 and 13, and various other amendments or additions to the draft articles which were of a drafting nature.

III. Scope of the topic and related issues

14. The scope of the topic has been carefully considered at various stages of the examination of the subject of international liability. Both within the Commission and in the debates in the Sixth Committee, differing views were expressed as to the need to cover environmental problems in general, and the global commons in particular. Similarly the question of whether harm arising from multiple sources interacting together and harm produced over a period of time in a cumulative fashion should also be included came up for consideration. It was a deliberate decision of the Commission to limit the topic only to those activities bearing a risk of causing significant harm. In the opinion of the Commission, issues concerning other possible harms would require different treatment, and they could not be subsumed in the treatment of the present topic of prevention of significant transboundary harm. Limiting the scope of the topic was deemed essential in order to complete the first and second readings of the draft articles on prevention within the current quinquennium. The Commission therefore felt it necessary to delete from the scope of the present draft articles former draft article 1 (b) tentatively proposed by the Working Group of the International Law Commission in 1996 in order to focus more sharply on the issues of prevention.[36]

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[34] France (A/CN.4/509, p. 4). See also China (A/C.6/53/SR.14, para. 41) (former article 3 (1996) could provide a basis for the regime of prevention). For the opposite view that former article 3 was unnecessary and better dropped, see Guatemala (A/C.6/53/SR.13, para. 56).

[35] See general comments of States on articles 1 to 17, A/CN.4/509, pp. 7-15.

[36] For a discussion of the various issues concerning the scope of the topic, see the First Report of the Special Rapporteur, A/CN.4/487, paras. 71-98 and 111-113. In the case of protection of environment, see: (a) Alexander Kiss, "The International Protection of the Environment", in R. St. J. Macdonald and Douglas M. Johnston (eds.), *The Structure and Process of International Laws: Essays in Legal Philosophy Doctrine and Theory* 1069-1093 (The Hague; Boston, Mass., Martinus Nijhoff, 1983). The author notes that the concept of "common concern of mankind" has become more relevant in dealing with global environmental problems; and that this is different from States accepting obligations in respect of the development of shared resources, including management of transboundary harm; (b) Rudiger Wolfrum, "Liability for Environmental Damage: A Means to Enforce Environmental Standards?", in K. Wellens (ed.), *International Law: Theory and Practice*, pp. 565-578 (1998), wherein it is submitted that liability regimes in the environmental context are slow to develop effective enforcement mechanisms and that their impact is more a way of deterrence than of a compensatory effect; (c) Prue Taylor, *An Ecological Approach to International Law: Responding to challenges of climate change* (London; New York, Routledge, 1998) (International liability as a legal response

15. On the desirability of specifying the activities falling within the scope of the present draft articles, it may be recalled that the Commission studied the matter carefully. In 1995, the Working Group recommended that there was no need to spell out the activities to which the draft articles could be applied. As science and technology was constantly evolving, activities falling within the scope of the draft articles could vary from time to time. In any case, what was excluded was reasonably clear. For example, the following fell outside the scope of the present draft articles: activities causing harm in their normal operation, that is, those beyond the state of a risk; harm caused by creeping pollution, that is, harm caused over a period of time, harm caused by a combination of effects from multiple sources, activities which do not have a physical quality and whose consequences flow from an intervening policy decision relating to monitoring, socio-economic or similar fields; harm caused to the environment in general, or global commons in particular.

16. Closely related to the question of scope of the topic is the requirement of the threshold of significant harm. Significant harm is explained as something more than measurable, but need not be at the level of serious or substantial harm. The harm must lead to a detrimental effect on matters in other States, such as: human health, industry, property, environment or agriculture in other States. Such detrimental effects must be capable of being measured by factual and objective standards. Further, significant harm is also explained as a combination of risk and harm encompassing at one end activities with a high probability of causing significant harm and at the other end activities with a low probability of causing disastrous harm. Besides, it is the view of the Commission that the threshold of significant harm is something that should be fixed by common agreement in respect of different activities depending upon the type of risk involved and hazard posed by the activity. Agreement in this regard would be directly related not only to the socio-economic conditions of the parties concerned but also to the scientific level and awareness of the implications of the activities and the availability of the technological resources. Accordingly, the fixing of a threshold is directly linked to the level of tolerance in the community, as well as the practical necessities or realities of the context in which the standard is sought to be agreed and implemented. Therefore it does not appear to be either possible or worthwhile to define a concept which, of necessity, would have to be arrived at by common agreement on the basis of available scientific and technological inputs and the practical realities of the context.[37]

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to the greenhouse effect is an improvement on State responsibility). However, it has the disadvantage of: applying the transboundary approach, being uncertain as to protection of the environment per se; and encouraging a piecemeal approach to regulation of environmental degradation. On global commons, see Mahnoush H. Arsanjani and W. Michael Reisman, "The Quest for an International Liability Regime for the Protection of the Global Commons", in K. Wellens (ed.), op. cit., pp. 469-492 (1998). Review by the authors of successive efforts to deal with harm to the global commons indicated "a quest for an effective legal regime that has, as yet, had very limited success"; further, it is a desirable policy to develop legal instruments which aim to abate activities harmful to the global commons within the legal framework of State responsibility for wrongful acts (p. 487).

[37] For a discussion of the concept of significant harm, see paragraphs 4 to 7 of the commentary to article 2, finalized by the Commission on first reading. See also Karl Zemanek, "State Responsibility and Liability", in W. Lang, H. Neuhold, K. Zemanek, eds., *Environmental Protection and International Law* (London, Graham and Trotman; Boston, Mass., M. Nijhoff, 1991), pp. 187-201, and in particular pp. 196-197.

IV. Prevention and liability

17. A number of comments from Governments addressed the need for the Commission to study the question of liability, which was in their opinion closely related to the topic of prevention of significant transboundary harm. It was suggested that without a fuller development of the topic of liability, treatment of the principle of prevention would remain inadequate as the consequences of harm would be outside the scope of prevention. Even though non-performance of the due diligence obligation governing the principle of prevention could be addressed in the field of State responsibility, the principle of liability, which was the focus of the Commission under the current topic, remained an important element. A close link was also observed between the obligation of due diligence and liability in the event of damage.

18. Without expressing any value judgement on the close relationship between the topic of prevention and liability, it is important to note that the Commission took a pragmatic decision in 1999 to deal with the topic of prevention first and finalize it in the second reading before examining the future course of action on the subject of liability.

19. The subject of due diligence was considered to be important by some delegations, which suggested that the matter should be examined further. This was precisely the subject of study of the Second Report of the Special Rapporteur.[38]

20. The Special Rapporteur concluded that the obligation of due diligence involved in the duty of prevention could be said to contain the following elements:[39]

(a) The degree of care in question is that expected of a good Government. In other words, the Government concerned should possess, on a permanent basis, a legal system and material resources sufficient to ensure the fulfilment of its international obligations. To that end, the State must also establish and maintain an adequate administrative apparatus. However, it is understood that the degree of care expected of a State with well-developed economic, human and material resources and with highly evolved systems and structures of governance is not the same as for States which are not in such a position. But even in the latter case, a minimal degree of vigilance, employment of infrastructure and monitoring of hazardous activities in the territory of the State, which is a natural attribute of any Government, is expected.

(b) The required degree of care is also proportional to the degree of hazardousness of the activity involved. Moreover, the degree of harm itself should be foreseeable and the State must know or should have known that the given activity has the risk of causing significant harm. In other words, the higher the degree of inadmissible harm, the greater would be the duty of care required to prevent it.

(c) In this connection, it is worth recalling the various principles considered in the First Report of the Special Rapporteur, such as the need for prior authorization, environmental impact assessment and the taking of all necessary and reasonable precautionary measures. As activities become more hazardous, the observance of procedural obligations becomes more important and the quality of the

[38] A/CN.4/501, paras. 18-30.
[39] Ibid., paras. 31-34.

measures to prevent and abate significant transboundary environmental harm must be higher.

(d) It is also believed that, in connection with the discharge of the duty of due diligence, the State of origin would have to shoulder a greater degree of the burden of proof that it had complied with relevant obligations than had the States or other parties which are likely to be affected.

V. Duty of due diligence and equitable interests

21. A separate question was raised about the relationship between article 12 on an equitable balance of interests among States concerned and the duty of prevention specified in article 3, and an apprehension was expressed that it might lead to a dilution of the obligation of prevention and due diligence. The comments are more in the nature of a caution against such a dilution. In any case, the apprehension expressed in this regard is misplaced. It may be emphasized that the requirement of achieving an equitable balance of interests is only addressed in the context of the obligation of cooperation imposed upon the States concerned. The balancing of interests is intended to result in a regime by the concerned States which would better implement the duty of prevention in a manner that is satisfactory to all States concerned.[40]

22. The question has been raised about the need to put the principle of prevention and the duty of due diligence in the broader context of sustainable development and the associated requirements of capacity-building and the establishment of suitable funding mechanisms, including an international fund, to help developing countries and countries in economic transition to establish necessary standards and acquire suitable technology to implement such standards or obligations. This is a matter that was fully considered by the Commission in 1998 on the basis of the First Report submitted by the Special Rapporteur. It was felt that the principle of prevention and the duty of due diligence was broadly related to questions of sustainable development, capacity-building and international funding mechanisms. In fact, this was expressly noted in the commentary to article 3. For example, it was noted, with reference to principle 11 of the Rio Declaration on Environment and Development, that standards applied by some countries might be inappropriate and of unwarranted economic and social costs to other countries, in particular, developing countries. It was also pointed out that the economic level of States was one of the factors to be taken into account in determining whether a State had complied with its obligations of due diligence. However, it is understood that a State's economic level could not be used to discharge a State from its obligation in this regard. Further, the Commission also noted that States were engaged in continuously evolving mutually beneficial schemes in the areas of capacity-building, transfer of technology and financial resources. Such efforts were recognized to be in the common interests of all States in developing uniform international standards regulating and implementing the duty of prevention.

23. Accordingly, it is reiterated that the implementation of the principle of prevention and the duty of due diligence is not isolated or divorced from the broader context of sustainable development and the consideration of the needs and practices

[40] See the comment and explanation of the United Kingdom, note 26 above.

of developing countries or countries in economic transition. In this context, it is also understood that each State is free to determine the priorities of its economic development in accordance with its own national policies and for this purpose to utilize and develop the natural resources within its territory or in areas under its jurisdiction or control in accordance with the principle of sovereignty and the permanent sovereignty over its natural resources. The obligation of due diligence involved in the principle of prevention is consistent with the right to development just as environment and development are seen as compatible concepts.[41] These are all issues on which States are engaged in negotiation in different bilateral, regional and multilateral forums. The draft articles focus only on the duty of prevention and due diligence in a limited context. The regime recommended is expected to provide only a suitable basis for more comprehensive and specific agreements to be concluded by States in respect of one or more of the activities covered. In this sense the regime designed is only aimed at providing a framework.

24. In view of the strong sentiment expressed, it is deemed appropriate to refer to some of these principles in the preamble to put the matter into proper perspective.

VI. Liability and responsibility: duality of regimes

25. In broadly defining the scope of activities covered by the draft articles, another important consideration is whether they should be characterized as activities not prohibited by international law. It may be recalled that the Commission first addressed this matter in the context of the study of State responsibility. At that time, the question concerning the obligation of a State to make good any transboundary harmful consequences arising out of activities conducted within its jurisdiction or in other places under its control (e.g., those involving space objects and nuclear reactors), especially those which because of their nature present certain risks but are not in themselves wrongful, was considered best left for a separate study.

26. The Commission concluded that: "[it] fully recognizes the importance, not only of questions of responsibility for internationally wrongful acts, but also of

[41] Protection of the environment is directly linked to development, sustainable development, inter-generational equity and shared but differentiated responsibilities. For the Institut du droit international view, Resolution of 4 September 1997, see G. Hand, "The Environment: International Rights and Responsibilities", 74 *American Journal of International Law* 223 (1980). With respect to public participation, environmental impact assessment and the polluter pays principle, "there are strong doubts" as to whether their status as principles of general international law is secured. The same is related to some extent to the difficulty of inferring customary law from treaty-provisions which are either ambiguous or which did not yet generate uniform and consistent practice. See Peter Malanczuk, "Sustainable development: some critical thoughts in the light of the Rio Conference", in Konrad Ginther et al. (eds.), *Sustainable Development and Good Governance*, 23-52 (1995), p. 43. On the principle of common but differentiated State responsibility and its application in the broader context of sustainable development, see Subrata Roy Chowdhury, "Common but differentiated State Responsibility in international environmental law: from Stockholm (1972) to Rio (1992)", in Konrad Ginther et al. (eds.), ibid., pp. 322-342 (the author argued that the concept was "not a paradigm shift in the legal philosophy of State Responsibility but rather a better articulation of State responsibility in the current conceptual and strategic linkage between environmental protection and sustainable development in a more equitable global order" (p. 322). Also see Kamal Hosain, "Evolving principles of sustainable development and good governance" in Konrad Ginther et al. (eds.), ibid., pp. 15-22.

questions concerning the obligations to make good any harmful consequences arising out of certain lawful activities, especially those which, because of their nature, present certain risks ... [T]he latter category of questions cannot be treated jointly with the former."[42]

27. Thus, State responsibility is concerned with the violation of a subjective international right even when it does not involve material damage.[43] On the other hand, international liability is premised upon the occurrence of significant harm or damage and not on any violation of an international obligation or subjective international right of a State.[44] To some extent the regime of liability could overlap with circumstances giving rise to wrongfulness, and for this reason the Commission avoided categorizing the topic as one dealing exclusively with "lawful" activities.[45] Thus, wrongful acts are the focus of State responsibility, whereas compensation for damage became the focus of international liability. The topic of prevention, on the other hand, is concerned with the management of risk.

28. The question then arises whether the reference to "activities not prohibited by international law" is appropriate in a regime which distinguished the duty of prevention from the broader concept of international liability. In this connection, it is suggested that few activities were per se generally prohibited under international law. The concern has always been for the consequences of the activities to determine whether they are permissible, lawful or unlawful, prohibited or not prohibited or wrongful. It has been pointed out that States are entitled to develop primary rules through treaty or customary practice and that it is the content of those rules that is critical, making global distinctions between lawful or unlawful activities useless and fundamentally misconceived. This is even more important now, as the draft articles were only dealing with prevention and not liability, which is outside the scope of the

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[42] *Official Records of the General Assembly, Thirty-second Session, Supplement No. 10* (A/32/10), article 7. The Special Rapporteur on State responsibility described the issues falling under the topic of liability as "questions relating to the responsibility arising out of the performance of certain lawful activities ... [o]wing to the entirely different basis of the so-called responsibility for risk". See Second Report on State responsibility, *Yearbook ... 1970*, vol. II, p. 178, document A/CN.4/SER.A/1970/Add.1.

[43] Rudiger Wolfrum, "Internationally Wrongful Acts", in *Encyclopedia of Public International Law*, Instalment 10, pp. 271-277, para. 276. See also Karl Zemanek, "Causes and Forms of International Liability" in Bin Cheng and E. D. Brown (eds.), *Contemporary Problems of International Law: Essays in honour of George Schwarzenberger on his eightieth birthday* (1988), pp. 319-333, para. 323.

[44] See First Report on prevention of transboundary damage from hazardous activities, document A/CN.4/487, paras. 41-44.

[45] See Alan E. Boyle "State Responsibility and International Liability for Injurious Consequences of Acts not Prohibited by International Law: A necessary distinction?" 39 *International and Comparative Law Quarterly* 1-25 (1990). On the differences between State responsibility and liability topics, see: (a) Mohammed Bedjaoui, "Responsibility of States: Fault and strict liability", *Encyclopedia of International Law*, Instalment 10, 1987, pp. 358-362; (b) Karl Zemanek, "State Responsibility and Liability", in W. Lang, H. Neuhold, K. Zemanek (eds.), *Environmental Protection and International Law* (1991), pp. 187-201; (c) Teresa A. Berwick "Responsibility and Liability for Environmental Damage: A Roadmap for International Environmental Regimes", vol. X, *Georgetown International Environmental Law Review*, 257-267 (1988); and (d) Sampong Sucharitkul, "State Responsibility and Liability in Transnational Relations", in Jerry Makarczyk (ed.), *Theory of International Law at the Threshold of the 21st Century*, pp. 283-299 (1996).

present articles.[46] The proponents of this view therefore recommend that the reference to "activities not prohibited by international law" in draft article 1 should be deleted.

29. However, according to another view, the reference to "activities not prohibited by international law" has come to signify a major dividing line between the topic of State responsibility and the broader topic of international liability, of which the principle of prevention is only a sub-topic. Hence the reference was considered not only useful but essential. Further, it was noted that a distinction should be made between "acts" and "activities".[47] While it was agreed that only a few activities (for example, prohibition of atmospheric nuclear testing or genocide, aggression) were the subject of prohibition under international law, the concern of the topic of liability has always been for the consequences or implications of an activity.[48]

30. It should be emphasized that the phrase under consideration is important to indicate that claims concerning the non-fulfilment of the principle of prevention and the obligation of due diligence would not give rise to any implication that the activity itself is unlawful or prohibited. It only enables the States likely to be affected to insist upon the performance of the obligations involved and the suspension of the activity concerned when proper safety measures have not been secured at a stage prior to the occurrence of any actual harm or damage.[49] To that extent, State responsibility could be engaged to implement obligations, including any civil responsibility or duty of the operator.[50] It is wrong to assume prohibition

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[46] A principal exponent of this view is Ian Brownlie, *System of the Law of Nations: State Responsibility*, Part I (1983), p. 50: "[T]he present writer adheres to the following proposition: The relations of adjacent territorial sovereigns are of course governed by the normal principles of international responsibility and these may sustain liability for the consequences of extra-hazardous operations." "The only elements of the topic which merit the Commission's efforts to construct a separate regime are the concepts of strict liability for environmental harm and the balance of interests sought by the rapporteurs" (ibid., p. 22). See also N .L. J. T. Horbach: "The confusion about State Responsibility and Liability" 4 *Leiden Journal of International Law* 47-74 (1991). He supports "separate study, not as part of State responsibility, but as an attempt to codify and develop aspects of international environmental law and, thus, substantive primary rules" (ibid., p. 72).

[47] Barboza explained: "Around a given activity there are countless individual acts which are intimately related to the activity; some of these acts may be wrongful, but this does not make the activity itself wrongful." *Yearbook ... 1986*, vol. II, p. 161.

[48] See Daniel Barston Magraw, "Transboundary harm: The International Law Commission's Study of International Liability 80 A.J.I.L. 305-330 (1986)". According to Magraw, "it is not self-evident that any doctrinal mischief would be caused if liability for injurious consequences of lawful activities is pursued as a topic separate from State responsibility, particularly when Brownlie himself admitted State accountability for ultra-hazardous but lawful activities" (pp. 3-7). Further, he believed that "the approach in schematic outline represents an overdue attempt to face up to an increasingly common fact of international coexistence" (p. 321) and that the "key will be to define the scope of the topic in a sufficiently modest manner so as not to invite non-compliance" (p. 322). See also the views of Zemanek, Berwick and Sucharitkul (note 45 above), who did not appear to question the distinction between liability and responsibility made on the basis of "activities not prohibited by international law".

[49] Karl Zemanek, op cit., p. 197. See also the Second Report on prevention of transboundary damage from hazardous activities, A/CN.4/501, paras. 35-37.

[50] For an examination of links which exist between State responsibility and liability and international civil liability regimes, see Alan Rosas, "State Responsibility and Liability under Civil Liability Regimes", in O. Bring and Said Mahmoudi (eds.), *Current International Law Issues: Nordic Perspectives (Essays in honour of Jerzy Sztucki)*. However, different standards of

as the inevitable result of responsibility for wrongful acts, and that a balancing of the benefits and drawbacks of socially useful activities is not possible if the distinction is not sharply made in the topic of State responsibility. For as noted, it is the content of the relevant rule and the absolute or relative character of the obligation involved which matters. At the most, it is suggested, it is the harm the activity is causing, as in the *Trail Smelter* case, that is prohibited and not the activity itself.[51]

VII. Recommendations

31. The phrase "activities not prohibited by international law" has been deliberately chosen only to indicate that the subject of international liability is pursued as a primary obligation as opposed to secondary obligations or consequences arising from a wrongful act, which is the subject of State responsibility. Further, it is aimed at emphasizing, in the case of significant transboundary harm, that the obligation is to make good the loss involved without any necessity for the victim to prove that the loss arose out of wrongful or unlawful conduct or to make the conduct itself wrongful or illegal. Eliminating or at least reducing such a burden of proof was considered necessary to establish a legal regime which could both deter the operator of hazardous activities and provide quick relief or compensation to victims in the case of a growing variety of environmental hazards where the causal connection cannot easily be established as a matter of scientific certainty or under a "reasonable and prudent" person test.

32. The above considerations are valid but would appear to relate to questions of liability for harm and fall outside the scope of the draft articles, which are aimed at the management of risk as part of prevention of significant transboundary harm. An emphasis on "physical connection", thus strictly limiting the scope of the draft articles, would help establish the causal or spatial connection much more directly in the case of activities covered by the draft articles than in the case of harm arising in other cases.

33. The test of balance of interests incorporated in articles 3, 10, 11 and 12 will be applicable to all activities, except to those which are expressly prohibited by virtue of a convention or agreement or customary international law. Developmental activities are not part of any such absolute or general prohibition. In the case of such developmental activities, given the growing interdependencies, particularly among regional communities, States have been adopting techniques of integrated management of risks involved, sharing the benefits and costs.

34. Another approach which the present draft articles emphasize is that the duty of cooperation and consultation among all States concerned does not provide a right of veto to the States likely to be affected, except for the right to seek an opportunity to

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liability, burden of proof and remedies apply to State responsibility and liability. See also Teresa A. Berwick, "Responsibility and Liability for Environmental Damage: A Roadmap for International Environmental Regimes", *Georgetown International Environmental Law Review*, 257-267 (1998).

[51] See M. B. Akehurst "International Liability for Injurious Consequences Arising out of Acts not Prohibited by International Law", XVI *Netherlands Yearbook of International Law* 3-16 (1985), Alan E. Boyle, note 55 above, p. 13.

be engaged in designing and, where appropriate, in the implementation of the system of management of risk commonly shared with the State of origin.

35. Given the above, it is felt that the phrase "activities not prohibited by international law" could be considered for deletion from article 1 of the draft articles on prevention. Any decision taken in this regard by the Commission would of course be without prejudice to the decision taken by the Commission at the last session.[52]

36. Finally, a number of drafting suggestions were made within the debates on the topic in the Sixth Committee of the General Assembly in 1998 and 1999 and in the comments subsequently submitted by some States. These were carefully considered in a Working Group of the Commission during the first part of its fifty-second session. A revised set of draft articles drawn up on the basis of consultations held is contained in the annex to the present report for consideration and adoption by the Commission in its second reading. Given the nature of the exercise involved, it is also recommended that these draft articles be adopted as a framework convention.

[52] " ... to defer consideration of the question of international liability, pending completion of the second reading of the draft articles on the prevention of transboundary damage from hazardous activities"; see *Official Records of the General Assembly, Fifty-fourth Session, Supplement No. 10* and corrigenda (A/54/10) and Corr. 1 and 2, para. 608.

Annex

Revised draft articles recommended on second reading following discussions held in the Working Group

Prevention of significant transboundary harm

The General Assembly,

Bearing in mind Article 13, paragraph 1 (a), of the Charter of the United Nations,

Recalling its resolution 1803 (XVII) of 14 December 1962, containing the Declaration on permanent sovereignty over natural resources,

Recalling also its resolution 41/128 of 4 December 1986, containing the Declaration on the Right to Development,

Recalling further the Rio Declaration on Environment and Development of 13 June 1992,

Bearing in mind that the freedom of States to carry on or permit activities in their territory or otherwise under their jurisdiction or control is not unlimited,

Recognizing the importance of promoting international cooperation,

Expressing its deep appreciation to the International Law Commission for its valuable work on the topic of the prevention of significant transboundary harm,

Adopts the Convention on the Prevention of Significant Transboundary Harm, annexed to the present resolution;

Invites States and regional economic integration organizations to become parties to the Convention.

Annex

Convention on the Prevention of Significant Transboundary Harm

Article 1
Activities to which the present draft articles apply

The present draft articles apply to activities not prohibited by international law which involve a risk of causing significant transboundary harm through their physical consequences.

Article 2
Use of terms

For the purposes of the present articles:

(a) "risk of causing significant transboundary harm" means such a risk ranging from a high probability of causing significant harm to a low probability of causing disastrous harm ~~encompasses a low probability of causing disastrous harm and a high probability of causing other significant harm~~;

(b) "harm" includes harm caused to persons, property or the environment;

(c) "transboundary harm" means harm caused in the territory of or in other places under the jurisdiction or control of a State other than the State of origin, whether or not the States concerned share a common border;

(d) "State of origin" means the State in the territory or otherwise under the jurisdiction or control of which the activities referred to in draft article 1 are carried out;

(e) "State likely to be affected" means the State in the territory of which the significant transboundary harm is likely to occur or which has jurisdiction or control over any other place where such harm is likely to occur;

(f) "States concerned" means the State of origin and the States likely to be affected.

Article 3
Prevention

States **of origin** shall take all appropriate measures to prevent, or to minimize the risk of, significant transboundary harm.

Article 4
Cooperation

States concerned shall cooperate in good faith and, as necessary, seek the assistance of one or more **competent** international organizations in preventing, or in minimizing the risk of, significant transboundary harm.

Article 5
Implementation

States **concerned** shall take the necessary legislative, administrative or other action including the establishment of suitable monitoring mechanisms to implement the provisions of the present draft articles.

Article 6 [7][1]
Authorization

1. The prior authorization of a State *of origin* shall be required for:

(a) all activities within the scope of the present draft articles carried out in the territory or otherwise under the jurisdiction or control of a State;

(b) any major change in an activity referred to in subparagraph (a);

(c) a plan to change an activity which may transform it into one falling within the scope of the present draft articles.

2. The requirement of authorization established by a State shall be made applicable in respect of all pre-existing activities within the scope of the present draft articles. **Authorizations already issued by the State for pre-existing activities shall be reviewed in order to comply with the present draft articles.**

[1] Article 6 has been moved towards the end of the draft articles and the remaining draft articles have been renumbered accordingly. The previous number of the draft articles appears between square brackets.

3. In case of a failure to conform to the requirements of the authorization, the ~~authorizing~~ State **of origin** shall take such actions as appropriate, including where necessary terminating the authorization.

Article 7 [8]
***Environmental* impact assessment**

Any decision in respect of the authorization of an activity within the scope of the present draft articles shall, **in particular,** be based on an **assessment** of the possible transboundary harm caused by that activity.

Article 8 [9]
Information to the public

States **concerned** shall, by such means as are appropriate, provide the public likely to be affected by an activity within the scope of the present draft articles with relevant information relating to that activity, the risk involved and the harm which might result and ascertain their views.

Article 9 [10]
Notification and information

1. If the assessment referred to in article 7 [8] indicates a risk of causing significant transboundary harm, the State of origin shall~~, pending any decision on the authorization of the activity,~~ provide the States likely to be affected with timely notification **of the risk and the assessment** and shall transmit to them the available technical and **all** other relevant information on which the assessment is based.

2. The State of origin shall not take any decision on prior authorization of the activity pending the receipt, within a reasonable time and in any case within a period of six months, of the response from the States likely to be affected.

~~[2. The response from the States likely to be affected shall be provided within a reasonable time.]~~

Article 10 [11]
Consultations on preventive measures

1. The States concerned shall enter into consultations, at the request of any of them, with a view to achieving acceptable solutions regarding measures to be adopted in order to prevent, or to minimize the risk of, significant transboundary harm. **The States concerned shall agree, at the commencement of such consultations, on a reasonable time-frame for the duration of the consultations.**

2. **The** States **concerned** shall seek solutions based on an equitable balance of interests in the light of article **11** [12].

2*bis*. **During the course of the consultations, the State of origin shall, if so requested by the other States, arrange to introduce appropriate and feasible measures to minimize the risk and, where appropriate, to suspend the activity in question for a *reasonable* period ~~of six months unless otherwise agreed~~.**[2]

[2] Former article 13, paragraph 3, with the addition of the term "***reasonable***".

3. If the consultations referred to in paragraph 1 fail to produce an agreed solution, the State of origin shall nevertheless take into account the interests of States likely to be affected in case it decides to authorize the activity to be pursued, without prejudice to the rights of any State likely to be affected.

Article 11 [12]
Factors involved in an equitable balance of interests

In order to achieve an equitable balance of interests as referred to in paragraph 2 of article **10** [11], the States concerned shall take into account all relevant factors and circumstances, including:

(a) the degree of risk of significant transboundary harm and of the availability of means of preventing such harm, or minimizing the risk thereof or repairing the harm;

(b) the importance of the activity, taking into account its overall advantages of a social, economic and technical character for the State of origin in relation to the potential harm for the States likely to be affected;

(c) the risk of significant harm to the environment and the availability of means of preventing such harm, or minimizing the risk thereof or restoring the environment;

(d) the degree to which the State of origin and, as appropriate, States likely to be affected are prepared to contribute to the costs of prevention;

(e) the economic viability of the activity in relation to the costs of prevention and to the possibility of carrying out the activity elsewhere or by other means or replacing it with an alternative activity;

(f) the standards of prevention which the States likely to be affected apply to the same or comparable activities and the standards applied in comparable regional or international practice.

Article 12 [13]
Procedures in the absence of notification

1. If a State has reasonable grounds to believe that an activity planned or carried out in the **State of origin** ~~territory or otherwise under the jurisdiction or control of another State~~ may have a risk of causing significant transboundary harm, the former State may request the latter to apply the provision of article ~~9~~ [10]. The request shall be accompanied by a documented explanation setting forth its grounds.

2. In the event that the State of origin nevertheless finds that it is not under an obligation to provide a notification under article **9** [10], it shall so inform the other State within a reasonable time, providing a documented explanation setting forth the reasons for such finding. If this finding does not satisfy the other State, the two States shall, at the request of that other State, promptly enter into consultations in the manner indicated in article **10** [11].

~~**3. During the course of the consultations, the State of origin shall, if so requested by the other State, arrange to introduce appropriate and feasible**~~

~~measures to minimize the risk and, where appropriate, to suspend the activity in question for a period of six months unless otherwise agreed.~~[3]

Article 13 [14]
Exchange of information

While the activity is being carried out, the States concerned shall exchange in a timely manner all available information relevant to preventing, or minimizing the risk of, significant transboundary harm.

Article 14 [15]
National security and industrial secrets

Data and information vital to the national security of the State of origin or to the protection of industrial secrets **or concerning intellectual property** may be withheld, but the State of origin shall cooperate in good faith with the other States concerned in providing as much information as can be provided under the circumstances.

Article 15 [16]
Non-discrimination

Unless the States concerned have agreed otherwise for the protection of the interests of persons, natural or juridical, who may be or are exposed to the risk of significant transboundary harm as a result of activities within the scope of the present draft articles, a State shall not discriminate on the basis of nationality or residence or place where the injury might occur, in granting to such persons, in accordance with its legal system, access to judicial or other procedures to seek protection or other appropriate redress.

Article 16
Emergency preparedness

States *of origin* shall develop contingency plans for responding to emergencies, in cooperation, where appropriate, with other States likely to be affected and competent international organizations.

Article 17
Notification of an emergency

States of origin shall, without delay and by the most expeditious means available, notify ~~other~~ States likely to be affected by an emergency concerning an activity within the scope of the present draft articles.

Article 18 [6]
Relationship to other rules of international law

Obligations arising from the present draft articles are without prejudice to any other obligations incurred by States under relevant treaties or rules of customary international law.

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[3] This paragraph has been moved to article 11, paragraph 2 *bis*.

Article 19 [17]
Settlement of disputes

1. Any dispute concerning the interpretation or application of the present draft articles shall be settled expeditiously through peaceful means of settlement chosen by mutual agreement of the parties, including submission of the dispute to mediation, conciliation, arbitration or judicial settlement.

2. Failing an agreement in this regard within a period of six months, the parties concerned shall, at the request of one of them, have recourse to the appointment of an independent and impartial fact-finding commission. The report of the commission shall be considered by the parties in good faith.

N.B. Articles 3, 11 and 12 have a mutually interacting relationship. While article 3 deals with the obligation of prevention which a State of origin has, article 11 indicates the need for that State and States likely to be affected to engage in consultations with each other on the basis of the criteria indicated illustratively and not exhaustively under article 12. The purpose of such consultations is to arrive at a mutually agreeable system of management of the risk involved or to help prevention of the risk of transboundary harm. This is not meant thus in any way to absolve the State of origin from the obligation it has under article 3 but only to aid better implementation of that obligation to the mutual satisfaction of all the States concerned. An agreement achieved in this regard shall, in case of an actual transboundary harm, be without prejudice to any claims based on liability or State responsibility.